No. 93-44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Appellants,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF NEITHER PARTY

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MOTION OF THE
AMERICAN CIVIL LIBERTIES UNION
FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.4, the American Civil Liberties Union (ACLU) respectfully moves for leave to file the attached brief *amicus curiae* in support of neither party.

We are filing this motion because, despite our best efforts, we have not yet received written consents from all of the parties to the proceeding listed in the jurisdictional statement submitted in this case on behalf of Turner Broadcasting System, Inc., *et al.* There are a total of forty parties listed in the jurisdictional statement. Thus far, twenty-seven have returned written consents, which are being lodged with the Clerk. So far as we can determine, the remaining thirteen parties listed in the jurisdictional statement have not yet responded to our request for consent. To date, no party has denied consent to the filing of an *amicus curiae* brief in this case by the ACLU.

The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the ACLU has participated in numerous free speech cases before this Court, both as direct counsel and as *amicus curiae*, including *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), in which the ACLU argued that Florida's right-to-reply statute was unconstitutional because it interfered with the editorial discretion of newspapers, and *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990), in which the ACLU supported congressional efforts to promote diversity within the broadcast industry.

The present case involves the application of these and other First Amendment principles to cable television, a rapidly evolving technology whose First Amendment status has never been definitively established by this Court. Accordingly, this case poses a series of important and unresolved doctrinal questions. The proper resolution of those questions is a matter of substantial

organizational concern to the ACLU because of its long-standing commitment to the First Amendment.

Respectfully submitted,

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INTEREST OF *AMICUS*

The interest of *amicus* is set forth in the motion attached to this brief.

STATEMENT OF THE CASE

This case challenges the constitutionality of sections 4 and 5 of the Cable Television Consumer Protection and Consumer Act of 1992, 47 U.S.C. §531, *et seq.* Section 4 of the Act, 47 U.S.C. §534, requires cable operators with more than 12 active channels to include all local commercial television stations as part of the basic cable package offered to cable subscribers.[1] Section 5 of the Act, 47 U.S.C. §535, requires cable operators with more than 36 active channels to set aside at least three of those channels for local noncommercial educational television stations.[2]

The legislative rationale for these so-called "must carry" rules is set forth at length in the Act's preamble. In particular, the "must carry" rules rest on five, principal congressional findings. First, most cable systems operate as monopolies due to "local franchising requirements and

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[1] There is an escape clause in §4 if the total number of local commercial television stations exceeds one-third of the cable system's activated capacity. Under these circumstances, the Act permits the cable operator to choose which local stations will be carried on its system.

In addition, the Cable Act stipulates that local commercial television stations carried pursuant to §4 are entitled to the same channel number on the cable system that they use for their over-the-air broadcasts. For example, if WCBS appears as Channel 2 on the broadcast dial in New York City, it must also appear as Channel 2 on any New York City cable system.

[2] Smaller cable systems have reduced requirements but, under §5, every cable system must provide at least one channel for noncommercial educational television.

the extraordinary expense of constructing more than one cable television system to serve a particular geographic area." 1992 Cable Act §2(a)(2).[3] Second, cable systems and broadcast systems "increasingly compete for television advertising revenues." 1992 Cable Act §2(a)(14). Third, this competition creates a natural incentive for cable systems to "delete, reposition, or not carry local broadcast systems." 1992 Cable Act §2(a)(16). Fourth, without access to cable, "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." *Id.* And fifth, "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." 1992 Cable Act §2(a)(6).

The constitutionality of the "must carry" rules was immediately challenged in a series of lawsuits. The appellants in this case include a consortium of cable operators and cable programmers.[4] Their essential claim is that the "must carry" rules violate the First Amendment for three related reasons. First, appellants contend, the "must carry" rules require a cable operator to say something (in the form of broadcast programming) it otherwise might not say. Second, they prevent a cable operator who is already operating at full capacity from saying something (in the form of displaced cable programming) it otherwise might say. Third, and derivatively, the "must carry" rules unfairly favor one category of speaker (broadcast television) at the expense of another (cable programmers).

Each of these contentions was rejected by the three-judge court that heard the case below. In an opinion by Judge Jackson, the majority concluded that the "must carry" rules had more in common with economic regulation than speech regulation, that strict scrutiny was therefore inappropriate and that, absent strict scrutiny, the congressional findings in support of the "must carry" rules were entitled to deference.[5] J.S.App. 2a-35a. Judge Williams dissented. In his view, the "must carry" rules are content-based and cannot survive strict scrutiny on this record. J.S.App. 50a-72a.

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[3] More specifically, Congress found that cable now supplies the signal to 60% of the nation's television receivers, 1992 Cable Act §2(a)(3); that more than 98% of American communities are served by a single cable system with a local monopoly franchise, J.S.App. 11a n.16; and that, while technically feasible, it is currently impractical for viewers to receive noncable broadcast signals once they have opted for cable, S. Rep.No. 92, 102d Cong., 1st Sess. 44-45 (1991). In their affidavits and other submissions, appellants have contested some of these findings and amplified others.

[4] Cable operators transmit broadcast signals through cables, generally laid under the streets or on telephone poles, to individual subscribers who pay to receive the cable transmission. Cable programmers produce material designed for transmission over a cable system. Several of the appellants are both cable operators and cable programmers.

[5] Pursuant to the jurisdictional scheme created by the Cable Act, the three-judge court only considered appellants' challenge to the "must carry" rules. Shortly after the three-judge court rendered its opinion, however, Judge Jackson, sitting as a single judge, also rejected appellants' challenge to the public and leased access provisions of the 1984 cable law, 47 U.S.C. §§531, 532. That decision is now on appeal to the D.C. Circuit. *Daniels Cablevision, Inc. v. U.S.*, No. 92-2292 (D.D.C. Sept. 16, 1993), *appeal docketed*, No. 53-5290 (D.C.Cir. Sept. 28, 1993).

It is worthwhile to note that "must carry" rules differ from public and leased access rules in at least three significant ways: (1) the "must carry" rules run in favor of a specific category of speaker -- local television broadcasters -- while public and leased access operates on a first-come, first-served basis; (2) "must carry" grants free access to cable systems, while "leased access" requires payment of a reasonable fee; and (3) the "must carry" rules guarantee favorable channel placement for broadcast television, while public and leased access channels can be placed anywhere on the dial by cable operators.

SUMMARY OF ARGUMENT

This case involves important and unresolved questions of First Amendment law, with potentially far-reaching applications, that unfortunately comes before this Court on a very incomplete record. Appellants discount the importance of a factual record because they believe that the "must carry" rules are facially inconsistent with the principles announced in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The government, for its part, also discounts the importance of a factual record but on the very different theory that the congressional findings provide ample justification for the constitutionality of the "must carry" rules.

In our view, neither position is correct. Appellants' contention that this case is controlled by *Tornillo* necessarily rests on the premise that cable operators and newspaper publishers should be treated indistinguishably for First Amendment purposes. We disagree. While many cities in this country may have only a single newspaper, that result is not the product of a government franchising system. When government actively and directly participates in the creation of a media monopoly, as it does with cable television but could not do under traditional First Amendment jurisprudence, the First Amendment stakes change and government's interest in assuring the rights of diverse speakers correspondingly increases. Under these circumstances, this Court has recognized the right of government to adopt structural regulations in a variety of different settings designed to maximize diversity and assure access to the medium by less powerful voices (without engaging in content-based censorship). *See, e.g., Metro Broadcasting v. FCC*, 497 U.S. 547 (1990); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

The validity of such regulations, however, cannot be judged in the abstract, nor should they be judged based on undue deference to legislative factfinding. While government's participation in the creation of a media monopoly may justify its interest in diversity-enhancing regulations, such regulations still represent a significant intrusion into the affairs of a First Amendment enterprise and demand serious judicial review. In particular, the courts must make their own independent judgment about the necessity, efficacy, and likely impact of the proposed regulatory scheme. *See Sable Communications v. FCC*, 492 U.S. 115 (1991). Because that inquiry never took place below, this case should be remanded for further proceedings so that a final judgment about the constitutionality of the "must carry" rules can be made in an appropriate factual context.

ARGUMENT

I. THE "MUST CARRY" RULES ADOPTED BY CONGRESS SHOULD NOT BE STRUCK DOWN AS *PER SE* UNCONSTITUTIONAL UNDER *TORNILLO* BECAUSE OF THE GOVERNMENT'S UNIQUE ROLE IN CREATING AND MAINTAINING CABLE MONOPOLIES

The threshold legal issue to be decided in this case is whether cable operators enjoy the same First Amendment rights as newspaper publishers. If so, the "must carry" rules must fall because, under existing law, the government plainly may not compel access to a newspaper in the name of diversity. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241. For a variety of reasons, however, we do not believe that *Tornillo* provides the appropriate analogy or a suitable basis for resolving this dispute.

Indeed, we believe that a simplistic reliance on *Tornillo* would not only be wrong, but dangerous. Equating the First Amendment rights of newspaper publishers and cable operators would either weaken current First Amendment doctrine by diluting the existing rights of

purely private speakers or needlessly ossify First Amendment doctrine by undermining government's interest in regulating the operation of a critically important information monopoly that it created. Indeed, under *Tornillo*, viewing cable operators as equivalent to newspaper publishers for First Amendment purposes could well mean striking down leased and public access, as well as the "must carry" rules, and thus effectively doom a panoply of government efforts to regulate monopoly cable operators.[6]

In fact, the Court's cases reveal a more complex approach to the First Amendment. When the speaker and hearer communicate without the umbrella of a government granted monopoly, as in the case of newspapers and more traditional forms of speech, this Court has refused to permit even well-intentioned efforts to regulate the free marketplace of ideas to increase diversity or, conversely, to limit the power of a single speaker. *E.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241; *Buckley v. Valeo*, 424 U.S. 1 (1976); *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981); *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986); *Meyer v. Grant*, 486 U.S. 414 (1988). *But see Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990).

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[6] As noted above, *see* n.5 *supra*, leased access and "must carry" raise different constitutional issues because, *inter alia*, "must carry" is designed to benefit one favored category of speaker at the expense of another. Insisting that cable operators are identical to newspaper publishers could, however, render such a potentially important distinction irrelevant, since even public and leased access would probably violate *Tornillo*. The ACLU has long supported the constitutionality of public and leased access at least in part because they create an electronic public forum. *See* H.R. Rep.No. 934, 98th Cong., 2d Sess. 30-31 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4667-68.

When, however, government grants a monopoly to a single speaker to carry out a significant communicative function, this Court has acknowledged a limited power to regulate the structure of the monopoly speech process in order to assure at least a minimum level of diversity with regard to both speech and speakers. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367; *Columbia Broadcasting System, Inc. v. FCC*, 453 U.S. 367 (1981); *Metro Broadcasting v. FCC*, 497 U.S. 547. *Cf. Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652. *See generally* Bollinger, "Toward a Theory of Partial Regulation of the Mass Media," 75 Mich.L.Rev. 1 (1976).

Television broadcasters, of course, face at least some competition from other broadcast licensees, although each broadcaster operates on the basis of an exclusive right to a designated portion of the electromagnetic spectrum. Cable operators, by contrast, typically face no competition from other cable systems in the same locality because of the nature of the franchising process. Thus, even more than television broadcasters, cable operators derive their monopoly status from the government and depend on the government to facilitate their speech by granting permission to dig up the streets.

As one court has noted:

> [A] cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disruption, especially to streets, alleys, and other public ways. Some form of permission from the government must, by necessity, precede such disruptive use of the public domain.

Community Communications v. Boulder, 660 F.2d 1370, 1377-78 (10th Cir. 1981). The FCC has similarly observed that "'local governments are inescapably involved

in the [franchising] process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters.'" *Id.* at 1378 n.8, *citing* 37 Fed.Reg. 3276 (1972).[7]

Reflecting this reality, the government has in fact established an elaborate system of government franchising for cable operators. *See* 47 U.S.C. §541. It also regulates cable franchise fees, *see* 47 U.S.C. §542, and other aspects of the cable industry's practices. *See, e.g.*, 47 U.S.C. §542 (capping fees that local franchising authorities can impose on cable operators).

A cable operator who is granted a government franchise generally "enjoys a virtual monopoly over its area, without the threat of an alternative provider." *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F. 2d 1540, 1550 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). In practical terms, therefore, the government-imposed franchising system makes real-market competition impossible and creates at least the danger that expressive diversity will be stifled as fewer and fewer entities dominate, with government assistance, the powerful cable communications medium.

The existence of government-imposed local monopolies sets cable television apart from print media. Subject to the substantial economic constraints that undoubtedly exist, anyone is free to publish a newspaper or magazine, or to hand out pamphlets, without seeking a government franchise. By contrast, individuals or entities that wish to communicate through the increasingly pervasive medium of cable television are at the whim of those operators to whom the government has granted a cable franchise -- or must rely on special access provisions like those at issue in this lawsuit.

This difference necessarily affects the First Amendment analysis and, in our view, justifies at least some regulation of cable that would not be permissible if we were dealing with newspapers. Strictly speaking, this is not a scarcity argument of the sort that has traditionally been used to justify government regulation of the broadcast industry. *See, e.g., FCC v. National Citizens Comm'n for Broadcasting*, 436 U.S. 775 (1978); *Red Lion Broadcasting v. FCC*, 395 U.S. 367. Unlike broadcast television, there is no technological limit to the number of available cable channels and thus no need for the government to allocate a limited number of available spaces on the electromagnetic spectrum among competing speakers. Like broadcast licensing, however, cable franchising thrusts the government right in the middle of the decision about who shall be allowed to speak.

It is somewhat disingenuous, therefore, to suggest that any government-mandated access rules violate the First Amendment rights of cable operators when the programming discretion that cable operators seek to protect from government regulation is also protected from market competition because of a government-awarded monopoly franchise. The contention that cable television should be regarded as equivalent to newspapers in all respects for First Amendment purposes simply ignores this crucial distinction.[8] Furthermore, if cable

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[7] *See also Carlson v. Village of Union City*, 601 F.Supp. 801, 810 (W.D. Mich. 1985)("Many courts have recognized that municipalities have substantial interests in controlling disruptive use of the public domain by cable television operations")(citing cases); *Berkshire Cablevision of Rhode Island v. Burke*, 571 F.Supp. 976, 985 (D.R.I. 1983).

[8] Recognizing that certain forms of monopoly speech are so intertwined with government assistance that the government is entitled to impose structural (as opposed to content) regulations in an effort to assure fair access and reasonably diverse content does not carry with it a general power to censor content in the name of decency, moral uplift or public policy. *FCC v. League of Women Voters*, 468 U.S. 364 (1984). Thus, whatever power Congress possesses to regulate monopoly cable operators and television broadcasters in the name of diversi-

(continued...)

television were to be treated as equivalent to newspapers for First Amendment purposes, then the government-created monopoly that cable operators now enjoy would itself violate the First Amendment.

There is, in addition, a second distinction between cable television and traditional newspaper publishing. This Court's decision in *Tornillo* upholding a First Amendment challenge to Florida's right-of-reply statute turned in large part on the Court's determination that the statute was an impermissible "intrusion into the function of editors." 418 U.S. at 258. At least for those cable systems with still unused channel capacity, or with current potential for increased capacity, that "intrusion" is less clear. Indeed, one way to think of cable operators is that they perform dual roles as both speaker and conduit, and that both roles are part and parcel of the monopoly granted by government franchise. Under this formulation, the access rules, including "must carry," are directed toward cable operators in their role as conduits and not in their role as speakers.[9]

Obviously, these labels cannot become a substitute for First Amendment analysis. Nor can First Amendment problems be ignored by the simple expedient of characterizing the target of government regulation as a conduit rather than a speaker. At the same time, it would be equally wrong to ignore the fact that the cable industry has a very different history than newspaper publishing, and that its original function was primarily to serve as a conduit for broadcast television rather than a speaker in its own right. *See Fortnightly v. United Artists Television*, 392 U.S. 390, 400-01 (1968).

History should not be destiny in this regard and the cable industry, like any other business, can change its focus over time. But the fact that the cable industry has historically played a conduit role along with its role as speaker, that the two roles can co-exist so long as there is unused channel capacity on the cable system, and that the access rules challenged in this lawsuit are not triggered by the content of the cable operator's own speech,[10] all further distinguish this case from *Tornillo* and suggest the need for a fresh look at the difficult constitutional issues presented.

II. BOTH THE MAJORITY AND DISSENT BELOW FAILED TO SUBJECT THE FACTUAL JUSTIFICATION FOR THE "MUST CARRY" RULES TO AN APPROPRIATE LEVEL OF JUDICIAL SCRUTINY

Just as appellants mistakenly argue that this case can be resolved on the basis of *Tornillo*, the government errs when it argues that no additional facts are necessary because the congressional record provides a conclusive resolution of the factual issues underlying the free speech controversy in this case. Once it is acknowledged that monopoly cable operators are subject to regulation, the government contends that the legislature's assessment of the need for such regulation and the efficacy of the means used to achieve the government's goal is conclu-

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[8] (...continued)
ty, we continue to believe that the power to censor content asserted in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) is profoundly dangerous and constitutionally unjustified.

[9] This Court has recognized in other contexts that media actors may play different roles with different First Amendment consequences. For example, in *Associated Press v. United States*, 326 U.S. 1 (1945), the Associated Press (AP) newspaper cooperative brought a First Amendment challenge to an antitrust decree that required AP to admit certain newspapers as members and share its news copy with them. In rejecting the First Amendment claim, the Court drew a distinction between AP's editorial and distributive roles. *Id.* at 20 n.18.

[10] *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 n.9 (D.C.Cir.), *cert. denied*, 434 U.S. 829 (1977).

sive in any later judicial proceeding. The government's contention, however, cannot be reconciled with First Amendment doctrine or this Court's prior cases.

While the existence of a government-sanctioned monopoly in an important communications medium may justify certain structural regulations designed to promote access to the medium and thereby a diversity of ideas and speakers that the government's award of a monopoly franchise might otherwise stifle, those regulations must still be subject to significant First Amendment scrutiny. Cable television is, obviously, an important medium for communication and cable programmers and operators are First Amendment speakers, in at least some of their roles. Indeed, this Court has already acknowledged that cable television provides its subscribers with "news, information, and entertainment," *Leathers v. Medlock*, 499 U.S. __, __, 111 S.Ct. 1438, 1442 (1991), and "communicates messages on a wide variety of topics and in a wide variety of formats." *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986).

Much of the battle in this case has inevitably revolved around the effort to define the appropriate standard of review in this unique and still evolving First Amendment context. More than anything else, however, this case demonstrates the wisdom of the Court's observation that First Amendment formulations developed to deal with one method of communication do not always apply with ease or precision to new and different media. *See, e.g., Metromedia, Inc. v. San Diego*, 453 U.S. 490, 501 (1981); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547 (1975); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

Not surprisingly, appellants seek to characterize the "must carry" rules as a form of content-based regulation that requires the government to carry the highest burden of justification under the First Amendment. *Police Dep't v. Mosley*, 408 U.S. 92 (1972). There are, undoubtedly,

elements of the "must carry" rules that have content-based implications. In a cable system that is operating at full capacity, the "must carry" rules may in some circumstances force a cable operator to displace its own programming in order to create room for local broadcast television. In a cable system with excess capacity, the "must carry" rules still give the broadcast stations a preferred place in line over other speakers who are relegated to the public or leased access channels on a first-come, first-served basis.

However, even viewed in this light, the "must carry" rules do not appear to present the same potential for censorship that is traditionally associated with content-based regulation. They do not address or limit the subject matter of any programming. *Cf. Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980). And while they differentiate among speakers, they do not do so in a way that appears to be a proxy for viewpoint-based discrimination. *Cf. First National Bank v. Bellotti*, 435 U.S. 765.

Nevertheless, it is also difficult to characterize this case as having only an "incidental" impact on speech and thus to evaluate the "must carry" rules under the relaxed First Amendment standard announced in *United States v. O'Brien*, 391 U.S. 367 (1968). The *O'Brien* test was developed to review a statute that "on its face deal[t] with conduct having no connection with speech." *Id.* at 375. That is clearly not true of the "must carry" rules. Furthermore, to the extent that the "must carry" rules can be said to compel speech by cable operators, they do aim at the suppression of expression (at least in the negative sense that our expressive rights under the First Amendment include the right not to speak). *See, e.g., Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1; *Wooley v. Maynard*, 430 U.S. 705 (1977).

Finally, the majority below characterized the "must carry" rules as a form of economic regulation having lit-

tle or no impact on the content of speech. This description also seems inaccurate or incomplete. For First Amendment purposes, there is a significant difference between general economic rules that are applied to a First Amendment enterprise like cable television and economic regulations that are expressly and uniquely targeted at First Amendment activity. If anything, this case fits within the latter category, where this Court has traditionally applied a heightened form of First Amendment scrutiny. *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

In the end, the precise formulation selected by the Court is less critical than the recognition that the "must carry" rules represent a major government effort to regulate the expressive options available on an important medium of communication and that this fact alone calls for a demanding standard of review. Whatever formulation is ultimately adopted, therefore, we respectfully submit that the very essence of free speech protection in these circumstances requires independent judicial scrutiny of four issues: (1) the validity of the government's interest in regulation;[11] (2) the factual necessity for regulation;[12] (3) the efficacy of the regulation;[13] and (4) the existence of alternative, less intrusive means of regulation.[14]

In every First Amendment case, the legislature (or an administrative official) will have answered the four questions in favor of regulation. Congress has done so here. If that were the end of judicial review, as the government argues in this case, the legislature would be left free to define the limits of its own First Amendment authority. This Court has never adopted that view. To the contrary, the Court has consistently and properly recognized that the essence of free speech protection is the availability of a judicial "second opinion" on each of the crucial four questions of interest, necessity, efficacy and narrow tailoring.

Thus, in *Sable Communications v. FCC*, 492 U.S. 115, this Court invalidated a ban on so-called "dial-a-porn" because a factual basis for the congressional attempt at speech regulation was not present. In response to an assertion similar to the government's in this case that the Court was bound to defer to Congress' belief that a flat ban on dial-a-porn was necessary to protect children, Justice White, writing for the Court, held:

> To the extent that the federal parties suggest

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[11] Courts have rejected the government's asserted interest in regulation in two settings. First, this Court has firmly rejected any effort to regulate speech because of a disagreement with its content. *E.g., Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S 788 (1985); *Grosjean v. American Press Co.*, 297 U.S. 233 (1968). Second, this Court has required that the government interest be qualitatively significant. *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951)(Frankfurter, J. concurring). In the context of this case, we believe that the two governmental interests asserted in support of the "must carry" rules -- the promotion of access and thereby presumably diversity, and the prevention of abuse by a government-franchised monopoly gatekeeper -- satisfy the criteria of neutrality and significance set forth in the Court's jurisprudence.

[12] The classic statement of the responsibility of the judiciary to exercise an independent review of the factual necessity for the regulation of speech is the "clear and present danger" test enunciated by Justices Holmes and Brandeis and accepted by this Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The movement from the "bad tendency" test to the "clear and present danger" test represents, in large part, the articulation of a judicial responsibility to assure that the factual justification for speech regulation actually exists.

[13] *See Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

[14] *See Sable Communications v. FCC*, 492 U.S. 115.

that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution. *That is particularly true where the Legislature has concluded that its product does not violate First Amendment. 'Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.' Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). The federal parties, however, also urge us to defer to the factual findings by Congress relevant to resolving the constitutional issue . . . . *Beyond the fact that whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law*, our answer is that the congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less drastic means . . . to achieve the government's interest . . . .

492 U.S. at 129 (emphasis added).

Unfortunately, the majority below declined to apply a *Sable Communications* standard to the alleged factual justification for the "must carry" rules. Instead, the majority substituted labels for analysis, holding that the statute in question was merely an "economic" regulation subject to minimal review for rationality. Such minimal review did not, in the view of the majority, entitle the court to conduct an independent review of the factual basis for the regulation. *See FCC v. Beach Communications, Inc.*, 508 U.S. __, 113 S.Ct. 2096 (1993). Whatever label one appends to the "must carry" rules, though, they impose direct governmental interference with the programming decisions of a protected speaker. Accordingly, they cannot be approved based simply on legislative factfinding and statements of need but must be subjected to independent First Amendment judicial review, as in *Sable Communications*.[15]

Appellants have vigorously asserted that no real factual basis exists for Congress' assumption that cable operators will treat local broadcasters with special hostility, or that "must carry" rules are needed to protect the health of the television broadcast industry and its continued presence on cable systems. Appellees vigorously disagree, arguing that "must carry" rules are a necessary prophylaxis against abuse of monopoly power.

Congress resolved these difficult factual questions in favor of regulation but, as Justice White explicitly noted in *Sable Communications*, when First Amendment rights are at stake, the judiciary has an obligation to make an independent inquiry into the factual justification for government interference with free speech. Because the court below misunderstood its responsibility, it did not conduct such an independent factual inquiry. While it is possible for this Court to conduct the inquiry for the first time at the appellate level, it would be far more efficient to remand the matter to the trial court for the initial factual inquiry, especially since summary judgment appears impossible given the parties' vigorous disagreement about the facts.

On the other hand, the legislative findings are obviously relevant on remand. Accordingly, we believe the

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[15] The argument for deference to congressional factfinding was different and stronger in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547. First, in *Metro Broadcasting*, Congress was acting pursuant to its constitutional authority to enforce the provisions of the Fourteenth Amendment. Second, *Metro Broadcasting* did not involve the countervailing First Amendment concerns that are present in this case.

dissent below erred in failing even to acknowledge the importance of the congressional finding that prophylactic regulation is necessary to assure access and diversity in the cable industry. For example, despite Congress' finding that current technology makes it impractical for viewers to receive both cable and local broadcast signals through the use of a so-called A/B switch, *see* n.3, *supra*, the dissent ignored the congressional finding and premised its opinion, in part, on the existence of a ready technological alternative to "must carry." It may be that such a viable technological alternative exists but, if so, Congress' findings must be rebutted by something more than a mere assertion.

This is not to suggest that plaintiffs in a First Amendment case ever bear the burden of *disproving* government claims of necessity. To the contrary, "it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). At the same time, the law does not require that congressional findings be ignored. In the absence of record evidence to the contrary, congressional findings are generally entitled to respect. Once contrary evidence has been placed before a court, however, the First Amendment demands that the government establish all four parts of the factual justification for any restriction on speech. *See* p.14-15, *supra*. Thus, on remand, Congress' findings about the need for "must carry" should be given substantial, but not conclusive weight.

The precise First Amendment status of cable operators is a difficult issue of critical importance. *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488. *See also United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). *See generally* Brenner, "Cable Television and the Freedom of Expression," 1988 Duke L.J.

329. The inherent difficulty of the issue is compounded by the shifting technological ground under the parties' feet. Assumptions about the technological capacity of cable, local broadcast, and other untried forms of transmission must necessarily play an important role in any judicial analysis. Yet, all agree that we stand on the threshold of vast technological change in the realm of mass communication -- change that may reshape our fundamental conception of the communications process. *See* "Special Issue, Videotex," 36 Fed.Comm.L.J. 119 (1984).

Accordingly, we urge the Court to refrain on this record from deciding the novel and difficult First Amendment issues presented by this case and to remand the matter for a more searching factual inquiry by the trial court. In the absence of a carefully developed factual record about necessity, efficacy and real-world impact of the "must carry" rules, it is impossible to do justice to the competing free speech claims that render this case so difficult. Among many other issues, the lower court should appropriately consider whether there is a demonstrated need for the "must carry" rules; whether the "must carry" rules are in fact designed to promote diversity rather than, as appellants contend, merely substituting one group of speakers for another; and whether there is a meaningful constitutional distinction between the application of "must carry" to otherwise unused portions of a cable system and the ousting of pre-existing speech from a fully utilized system.

Only when the full facts are known regarding the need for and impact of the "must carry" rules will this Court be in a position to assess the significant First Amendment interests on both sides of this case.

CONCLUSION

For the reasons stated above, this Court should reject the proposition that the "must carry" rules adopted by Congress in the 1992 Cable Act are *per se* unconstitutional under *Tornillo*, and then remand the case for further development of a factual record regarding the need for the rules and whether they are appropriately crafted to achieve their stated purpose of promoting diversity.

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